Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1512

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BEVERLY ANN SCHWARTZ, By Her Next Friend, LARRY SCHWARTZ,

Petitioner,

vs.

GORDON GILSTER, Sheriff of Lincoln County, Nebraska,

Respondent.

---o---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

---o---

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MARCH 26, 1979

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DECISIONS BELOW

Petitioner's conviction was appealed to the Nebraska Supreme Court. That court upheld the conviction, *State of Nebraska v. Schwartz*, 199 Neb. 17, 255 N. W. 2d 859 (1977). Rehearing was denied by the Nebraska Supreme Court on September 16, 1977. Petition for writ of habeas corpus was filed in the United States District Court for the District of Nebraska. The petition was denied, Case CV78-L-51; opinion of August 3, 1978 (unpublished). Appeal was taken to the United States Court of Appeals for the

Eighth Circuit, Case No. 78-1606. That Court affirmed by unpublished opinion of December 29, 1978.

JURISDICTION

Jurisdiction is conferred herein by 28 U.S.C. § 1254(1). Petitioner seeks review of the order of the United States Court of Appeals for the Eighth Circuit of December 29, 1978, in Case No. 78-1606. That court denied petitioner's timely petition for rehearing on January 29, 1979. The mandate issued February 8, 1979, and was filed in the District Court on February 12, 1979. Petitioner prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

QUESTION PRESENTED FOR REVIEW

Does Neb. Rev. Stat. § 25-1601, which excludes persons between the ages of eighteen and twenty-one, and persons over seventy, result in a jury which is not a representative cross section of the community, thereby depriving a defendant of a fair trial under the Sixth Amendment?

CONSTITUTIONAL PROVISION AND STATUTES

This case involves the validity of Neb. Rev. Stat. § 25-1601 which, in relevant part states:

> "(1) All citizens of the United States residing in any of the counties of this state and having the qualifications of electors in such counties, who are over the age of twenty-one years and under the age of seventy years and who are intelligent, of fair character, of approved integrity, well informed, able to read, write, and understand the English language, of sound mind and discretion,

> and free from all disqualifications herein set forth and from all other legal exceptions, are and shall be competent persons to serve on all grand and petit juries in their respective counties . . .";

when measured against the standards of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

Defendant and her husband, Larry J. Schwartz, were each charged by the Lincoln County Attorney, by Information, with violation in three counts of Nebraska Revised Statute 28-926.17, to-wit:

> (1) Any person who knowingly (a) prints, copies, manufactures, prepares, produces or reproduces obscene material for purpose of sale or distribution, (b) publishes, circulates, sells, rents, lends, transports intrastate commerce, or distributes or exhibits any obscene material, (c) has in his possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promotes any obscene material or performance shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.
>
> (2) Every person who places an order for any advertising promoting the sale or distribution of material represented or held out to be obscene, whether or not such material exists in face or is obscene, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by imprisonment for not more than one year, or by a fine of not more than one thousand

dollars, or by both such fine and imprisonment. In all cases in which a charge or violation of this section is brought against a person who cannot be found in this state, the executive authority of this state may demand extradition of such person from the executive authority of the state in which such person may be found.

(3) A person commits an offense of promoting obscene material if knowing its content and character he: (a) Disseminates for monetary consideration any obscene material (b) produces, presents, or directs obscene performances for monetary consideration; or (c) participates for monetary consideration in that part of a performance which makes it obscene.

A plea of not guilty to those charges were proferred to and accepted by the Court.

The issues tried were the issues raised by the charge filed by the County Attorney.

After the jury had been selected, defendant moved for a mistrial based on her assertion that the statutory prohibition against the inclusion of any individual between the ages of 18 and 21 and over the age of 70 resulted in a failure to provide a representative cross-section of the community in violation of defendant's Sixth and Fourteenth Amendment rights. In so moving, counsel for defendant stated:

> What we simply do challenge, Your Honor, and because of it this case can be declared a mistrial and another jury chosen in conformity with, not with the statutes of the State of Nebraska, but with the Constitution, is that we have a problem and the problem is this: That persons who are able to buy explicit material need only be 19 years of age, and there is no age limit upon which they are precluded from buying explicit

> material. Therefore, we have a situation where jurors are systematically excluded until they attain the age of 21 years, and then they are systematically excluded beyond the age of 70. But, what bothers us, under Nebraska law, as I said, under the obscenity statutes the jury is the embodiment of the community thought. It is the community's conscience. Any by jurors systematically excluded that portion of the community's conscience is not being heard and cannot be heard and cannot be reflected in any jury.
>
> Therefore, since the jury de facto is not an embodiment of the community standards, and is therefore not de facto the embodiment of the community conscience, we would say that because of the systematic exclusions that the defendants do not have a jury that they are entitled to have and, namely, voicing all walks of life, all creeds, colors, regions and age groups within the age group permitted by statute to have this material available to them (136-137).

In denying the defendants motion for a mistrial, the Court concluded that:

> My reading of the statute is, rather, than not, that persons from 19 to 21 are excused or exempt from jury duty, but that he is not qualified, that he is not competent; * * * I agree with Mr. Schwartz that the source underneath that statute that the last time that the law was amended was in 1969; and, without researching the law, my memory is that in 1969 the jury age was lowered from 25 to 21, and the same criteria and arguments that were advanced from 19 to 21 could certainly be advanced from the age of 21 to 25.
>
> If the argument is logical and should be granted, most of the cases that have been heard in the State of Nebraska since the formation of the State would have to be thrown out because most

of the jury cases for many, many years the bottom age was 25.

I agree with the logic advanced by Mr. Schwartz, that there is no reason that the citizen 19 to 21 should not make as good a juror as the person who is 22, or the person that is 69 is not necessarily a better juror than the person who is 71. However, I do feel that the state has a right to list the qualifications for service on a jury; and, having listed the age limitation of 21 to 70, I shall follow the statute and refuse the motion to disqualify the jury as a whole, and I do so act.

Pursuant to a defense motion, the State trial court dismissed all charges against Larry L. Schwartz. A jury found the defendant guilty on all three counts. Upon that jury verdict, the State trial court entered a judgment of conviction and imposed a fine of $1,000.00 on each count or a total of $3,000.00 in addition to a term of thirty (30) days in jail on each count, which terms are to be served concurrently.

The State trial court subsequently denied a defense motion for a new trial.

Defendant took her appeal to the Nebraska Supreme Court, which affirmed the conviction on July 13, 1977. On September 16, 1977, defendant's Motion for Rehearing was denied. Defendant was thereafter incarcerated in early March of 1978 by Supreme Court mandate.

On March 3, 1978, the petition in this case was filed. Jurisdiction was founded upon 28 U.S.C. §§ 2241 and 2254. After answer, the matter was heard by Judge Urbom on April 27, 1978. On August 3, 1978, Judge Urbom entered an order dismissing the

petition and supporting memorandum opinion.

Judge Urbom found the defendant's petition without merit by finding that the jury in question was not selected in an unconstitutional manner. The petition was dismissed.

Defendant filed Notice of Appeal on August 8, 1978. By order of December 29, 1978, the United States Court of Appeals for the Eighth Circuit affirmed.

REASONS FOR ALLOWING THE WRIT

I.

The differing opinions of the Courts of Appeals should be settled by this Court.

In his memorandum opinion in this case, Chief Judge Urbom found: "The dispositive question in this case is whether the specified group [sic] constitutes an identifiable class." Relying on the decision of the Eighth Circuit in *United States v. Olson*, 473 F. 2d 686 (8th Cir. 1973), Judge Urbom found that the groups specified did not. Upon this same reasoning the Eighth Circuit affirmed Judge Urbom's decision, reinforcing their view in *Olson*. The underlying theory, in each instance, was that no showing had been made that the views of the group(s) were not adequately represented by those a few years younger or older.

In *United States v. Butera*, 420 F. 2d 564 (1st Cir. 1970), the defendant claimed underrepresentation of young persons and very old persons on the grand jury which indicted him. Statistically, Butera showed that compared to a "true cross-section," his

jury pool was underrepresented as to those below forty and over seventy-five. In *Butera*, the Court found "young adults" to constitute a cognizable—"though admittedly ill-defined—group for purposes of defendant's prima facie case." *Id.* at 570. (For other reasons, *Butera* was resolved for the government.)

The divergence of these opinions is obvious. It is hilighted by the fact that in both cases the legal conclusion reached as to cognizability was based upon a reaction or assessment of something other than facts or evidence before the courts. In *Olson*, quite without explanation, the *presumption* was one of fungibility; in *Butera*, the *presumption* was to the contrary. Olson failed in his argument for lack of proof (however that may be possible) of *non*-fungibility; Butera prevailed on the question due to that Court's assumed social awareness.

The discrepancy of the two decisions needs to be resolved. This case is the proper vehicle.

II.

The decision in this case presents an important question of federal law which should be settled by this Court.

Petitioner suggests that determination of the question in this case, whether Neb. Rev. Stat. § 25-1601 passes constitutional muster, is of great importance. Few rights are given or deserve closer protection than the guarantee of a fair trial. It has been suggested that a case such as this produces no benefit. *Duren v. Missouri*, ____ U. S. ____, 58 L. Ed. 2d 579, 595 (1979). Petitioner does not agree with such an

assessment, but agrees with the statement of this Court in *Taylor v. Louisiana*, 419 U. S. 522, 530 (1975):

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. * * * This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (Citations Omitted.)

III.

The decisions of the Courts below are not in harmony with this Court's decisions in *Taylor v. Louisiana* and *Duren v. Missouri*.

Petitioner contends that the application of Neb. Rev. Stat. § 25-1601 violated her Sixth Amendment right to a fair trial. By applying the statute, the trial court imposed on her a jury not representative of the community, in a case where the community's standards were the essence of guilt or innocence. We contend that the selection statute, excluding persons by age violates the mandates of *Taylor v. Louisiana*, 419 U. S. 522 (1975), and *Duren v. Mis-*

souri, ___ U. S. ___, 58 L. Ed. 2d 579 (1979), negating the possibility of a jury constituting a representative community cross-section.

In *Taylor*, this Court rejected a Fourteenth Amendment test, for one based upon the Sixth Amendment, applicable to the states by the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U. S. 145 (1968). In *Taylor* it was said:

> The jury . . . panels . . . must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. 419 U.S. at 538.

In *Duren*, the Court has more clearly defined the issues:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group . . . is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, ___ U. S. ___, 58 L. Ed. 2d 579, 586-87 (1979).

Once the case is made out, the burden shifts to the State to show justification. *Id.* at 587.

In the case at bar, as noted by Judge Urbom, items (2) and (3) are not at issue; these must be conceded from the face of Neb. Rev. Stat. § 25-1601. The question is whether those under 21 (19 and 20 year olds) and over 70 constitute "cognizable" groups.

The *Taylor* opinion quoted from *Ballard v. United States*, 329 U. S. 187 (1946), in noting that the subject group (women) was "not fungible" with other groups. The Court further noted that the exclusion of the subject group would result in the loss of "a flavor, a distinct quality" from the jury panel. The Court in *United States v. Test*, 399 F. Supp. 683, 689 (D. C. Colo. 1975) posited three factors:

> 1. The presence of some quality or attribute which "defines and limits" the group;
>
> 2. A cohesiveness of "attitudes or ideas or experiences" which distinguishes the group from the general social milieu; and
>
> 3. A "community of interest" which may not be represented by other segments of society.

In *Thiel v. Southern Pacific Co.*, 328 U. S. 217 (1946), the Court spoke of "economic, social, religious, racial, political and geographic groups." Justices Holmes and Frankfurter aluded to "a different outlook" or "a different sense of justice."

The seminal case on cognizability, *Hernandez v. Texas*, 347 U. S. 475, 479 (1954), looked to the "attitude of the community," and its treatment of group members to determine if the subject group was recognized as a distinct entity. *Hernandez* noted that "Whether such a group exists within a community is a question of fact."

Turning to the two groups involved herein, ample support for their cognizability may be found from diverse sources. Initially, the statutory classification itself, unless one admits its meaninglessness, represents some recognition that there is a basis for these

groupings.

The notion that young people constitute a distinct part of the community is not new. Literature has acknowledged this as a fact for centuries. The following sampling is very small, but from persuasive sources:

> "I am young and ye are very old; wherefore, I was afraid and durst now show you mine opinion." Job 32:6
>
> "It is very natural for young men to be vehement, acrimonious and severe." Samuel Johnson, *The Rambler*, No. 121.
>
> "Young men, in the conduct and management of actions, embrace more than they can hold; stir more than they can quiet; fly to the ends without consideration of the means and degrees . . . . Men of age reject too much, consult too long, adventure too little, repent too soon and seldom drive business home to the null period, but content themselves with a mediocrity of success." Francis Bacon, *Of Youth and Age.*
>
> "Youth does not dare to look itself in the mirror of conscience when it is leaning toward injustice; maturity has already seen its image at such a moment—in this lies all the difference between these two periods of life." Balzac, *Pere Goriot.*
>
> "When we are at the end of life, to die means to go away; when we are at the beginning to go away means to die." Victor Hugo, *Les Miserables.*

Young people have distinct ideas and experiences. *See generally*, Keniston, The Uncommitted (1965), Harcourt Brace, New York. Certainly, an important factor that demonstrates that young people are a

cognizable group is the fact that large segments of this society harbor hostility toward youth. "Report of the President's Commission on Campus Unrest" (CCH College & Univ Reps, Series No. 277, 1970), p. 8; emphasized this hostility, saying "A nation's drive to use weapons of war upon its youth is a nation on the edge of chaos. A nation that has lost the allegiance of part of its youth is a nation that has lost part of its future."

Furthermore, to hold that young people do not constitute a population group that is definable and possibly subject to prejudice surely overlooks the growing recognition that young people in our country have developed their own culture and ideals. Reich, The Greening of America, (1970), Random House, New York; Erikson, Identity, Youth and Crisis, (1969), Jeffy Norton Publications, Inc., New York.

The Court in *United States v. Butera*, 420 F. 2d 564, 570 (1st Cir. 1970) commented:

> [W]e are satisfied that young adults constitute a cognizable — though admittedly ill-defined — group for purposes of Defendant's prima facie case. We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons — in our case those between 21 and 34 — will be insulated from attack. Nor can we close our eyes to the contemporary national preoccupation with a 'generation gap' which creates the impression that the attitudes of young adults are in some sense distinct from those of older adults. That apparent distinctness is sufficient for us to say that neither class could be excluded from jury pools without some justification.

In *United States v. Sinclair*, (E. D. Mich. No. 44375, Jan. 25, 1971) (unreported), the Court observed:

> 'young people' are a cognizable group. Many young people in the United States today have different values, different standards, different attitudes, different lifestyles and different feelings toward our political system and its processes than do their elders.

In making a similar holding, the Wisconsin Supreme Court noted:

> ". . . we think that systematic discrimination in regard to age would render the jury array just as defective as any other type of systematic discrimination." *State v. Holmstrom*, 43 Wis. 2d 465, 168 N. W. 2d 574 (1969).

Although not yet as well documented, those over 70 exhibit similar traits of cognizability. The formation of numerous "Grey Liberation" groups indicate a commonality of social and economic interests. The large number of those over 70 on fixed income demonstrates a commonality of needs. The fact that those over 70 have lived through more massive changes than any other group — two World Wars, a Depression, great technological change — manifests a crucial experience which should not be removed from a jury. Recent legislation to prevent age discrimination further documents the cognizability of this group. See, 29 U.S.C. 621 et seq. In addition, as one commentator has noted,

> ". . . in the future the Court may strike down state jury statutes which result in significant subtractions from cross section because they excuse . . . senior citizens on request . . ."

> Comment, *Taylor v. Louisiana: The Jury Cross-Section Crosses the State Line*, 7 U Conn. L. Rev. 508, 527 (1975).

The promulgation of numerous laws dealing with the elderly demonstrate that the aged exhibit the characteristics of a cognizable group. Recently, the Department of Health, Education and Welfare proposed regulations which would treat the elderly as a group for purposes of Social Security Assistance pursuant to 42 U.S.C. 301 et seq. These regulations represent a finding that large numbers of the elderly receive income less than the national median and that they suffer the same related disabilities. Numerous states have mandatory retirement laws.

Special sections of the Domestic Volunteer Service Act, 42 U.S.C. 495 et seq., provide for a National Older Americans Volunteer Program, 42 U.S.C. 5001-5023. These programs recognize the continuing vitality of older citizens and the special experience and resources which they have to offer. Compared to such laws which encourage the continuing involvement of our older citizens, the Nebraska jury statute represents a detrimental unrealistic anachronism.

Recently, the Congress overwhelmingly rejected an attempt by its Rules Committee to merge the Senate select committee on aging into another committee. This rejection constitutes another statement that the elderly have special distinct problems which require special action.

In light of the foregoing, the Court might well ask whether Defendant is not really challenging the jury

selection statute *in toto* rather than as applied. Most of the above arguments could be used for such a challenge.

One crucial aspect of *Taylor v. Louisiana*, however, serves to distinguish this case from any other and to restrict defendant's challenge to the application of the statute.

The aspect of the *Taylor* opinion is the Court's requirement that questions of cognizability be considered on a case-by-case basis. The opinion itself leaves a significant amount of leeway for localities:

> "The states remain free to prescribe relevant qualifications for their jurors and to provide *reasonable exemptions* so long as it may be fairly said that the jury lists or panels are representative of the community." 419 U.S. at 538. [Emphasis Supplied.]

The important factor for this case is the Court's mention of "exemptions." This focus means that the Court is emphasizing an *ad hoc* approach to jury duty. Therefore, the State of Nebraska can no longer assume that the elderly will be physically and/or mentally unfit to serve. This facile administrative assumption must give way to a case-by-case determination of individual fitness. The same principle applies to an assumption that youth cannot serve because they are too transient or in school.

This *ad hoc* approach manifests a crucial paradox evident in the *Taylor* opinion, one dispositive of Defendant's claim in the case at bar. Although the *Taylor* Court eliminated the need for a Defendant to show prejudice once he has proven the systematic exclusion of a cognizable group, a post-*Taylor*

defendant must still make a showing of prejudice as the cornerstone for his argument that a given group is legally cognizable under the facts of his case.

In discussing cognizability, the *Taylor* opinion stated:

> "Communities differ at different times and places. What is a fair cross-section at one time or place is not necessarily a fair cross-section at another time or a different place." 419 U.S. at 538.

Thus, an inquiry into cognizability must take into account prevalent community attitudes and mores and the effect of them on a given case.

In no case could the presence of all groups, attitudes and mores of the community be more crucial than in this case. Unlike other criminal matters, where the law details the offense, here a defendant's very guilt or innocence depends upon "contemporary community standards." *Miller v. California*, 413 U.S. 15, reh. den., 414 U.S. 881 (1973).

Where First Amendment rights are involved every effort must be made to assure a fair hearing. Such rights have been given a "preferred" position in an heirarchy of freedoms. *Dombrowski v. Pfister*, 380 U.S. 479 (1967). Here, the trial court prevented a fair hearing by applying to the subject works the community standards of only a part of the community. The massive changes in availability of such material, in public sentiment about such material, in legal thought concerning such material and in the impact on education of such material indicate the existence of a broad spectrum of thought in the com-

munity. *See, F. Schauer*, The Law of Obscenity (1976), § 1.3, pp. 9-29. For many, such books as Lawrence's Lady Chatterly's Lover, Dreiser's An American Tragedy, and Erskin Caldwell's God's Little Acre, were made unavailable because of their "obscenity." *Id.* at 25-27. Now, such works are standard educational fare.

We are not concerned with such crimes as murder, robbery or rape which are not matters viewed differently by those of varying age. Rather, we are dealing with pornography, an emotional issue, one causing a broad spectrum of opinion. To foreclose any part of this spectrum, as the trial court felt compelled to do, is to foreclose a fair trial.

This Court may voice concern over the administrative difficulties in determining cognizability on an *ad hoc* basis. However, such concerns are not only minor in comparison to the rights involved, but are precluded by the *Taylor* opinion itself. Since those between 18 and 21 and over 70 are represented on the voting lists, adding them on an *ad hoc* basis, pursuant to a finding of cognizability would not be as problematical as a failure to do so would be harmful. Additionally, with regard to age grouping, cognizability would not be so common as to be burdensome and would have to be proven by a defendant in any case.

CONCLUSION

For the foregoing reasons petitioner prays that this Court issue a writ of certiorari to the United

States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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IN THE

SUPREME COURT OF NEBRASKA

———o———

STATE OF NEBRASKA, APPELLEE, V. BEVERLY ANN SCHWARTZ, APPELLANT.

— N. W. 2d —

Filed July 13, 1977. No. 41079.

1. **Criminal Law: Jurors: Due Process.** A defendant is not denied a fair trial because persons who are 19 and 20 years of age and over 70 years of age are excluded from serving on the jury.
2. **Criminal Law: Instructions: Trial.** An instruction which directs the jury to apply community standards without specifying what community is not erroneous.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

James Tyler, Arthur M. Schwartz, and Neil Ayervais, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The defendant, Beverly Ann Schwartz, was convicted on three counts of selling obscene motion picture films. The films which the defendant sold were entitled "Smokers, Blue Monday," "The Masturbater," and "Wet and Warm, A Debauchery Film." No contention is made that the films were not obscene.

The defendant was fined $1,000 and sentenced to imprisonment in the county jail for 30 days on each count, the sentences to run concurrently. She has

appealed and contends that section 25-1601, R. R. S. 1943, is unconstitutional and that the trial court erred in failing to properly define "contemporary community standards" in the instructions to the jury.

Section 25-1601, R. R. S. 1943, provides that jurors shall be selected from persons who are "over the age of twenty-one years and under the age of seventy years." The defendant contends that the exclusion of persons from 18 to 21 years of age and over 70 years of age from the jury prevented her from having a fair trial because the jury was not a representative cross-section of the community.

In State v. Foster, 196 Neb. 332, 242 N. W. 2d 876, we considered a similar contention in regard to the exclusion of 19 and 20 year old persons from grand jury service. We held in that case that persons who are 19 and 20 years of age did not constitute a cognizable class and their exclusion from jury service was not arbitrary. We think that case is controlling here and that the defendant's contention is without merit.

Instruction No. 11 given to the jury was as follows: "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the contemporary community standards of the intended and probable recipient group is, and in determining the contemporary community standards of said group you may consider the divergent ages, the educated and uneducated, the religious and irreligious men and women, and, of course, any other characteristics which go to make up the 'average person' of the intended and probable recipient group. * * * In this connection you may consider the contemporary standards of the community in books magazines, literature, movies, stage plays, religion, social conduct, and so forth."

The defendant argues that the instruction was erroneous because the trial court did not define "community" as encompassing the State of Nebraska. The defendant cites Jenkins v. Georgia, 418 U. S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642, and concedes that the Jenkins case held that an instruction which directs the jury to apply community standards without specifying what community does not violate the Constitution of the United States. In State v. Little Art Corp., 189 Neb. 681, 204 N. W. 2d 574, we held such an instruction was not erroneous under Nebraska law. Furthermore, as in the Little Art Corp. case, the materials in question here would affront any standard.

The judgment of the District Court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BEVERLY ANN SCHWARTZ, by her next friend, LARRY SCHWARTZ, Petitioner, vs. GORDON GILSTER, Lincoln County Sheriff, Respondent.	MEMORANDUM CV78-L-51

APPEARANCES: For petitioner, Terry K. Barber

For respondent, Milton R. Larson

URBOM, Chief Judge

This habeas corpus action was brought on behalf of the petitioner, Beverly Ann Schwartz, by Larry Schwartz as next friend. A jury found Beverly Ann Schwartz guilty of selling obscene motion pictures, in violation of § 28-926.17, R.R.S. Neb. (Reissue 1975). The petition alleges that the conviction is void because:

1. Individuals between the ages of eighteen and twenty-one and individuals over seventy years of age were excluded from the jury array; and

2. The trial court never properly instructed the jury on the definition of contemporary community standards.

These same issues were raised on appeal from the conviction; thus, state remedies have been exhausted.

I.

JURY SELECTION

Section 25-1601 of the Nebraska Revised Statutes provided at the time of the trial in question:

> "(1) All Citizens of the United States residing in any of the counties of this state and having the qualifications of electors in such counties, who are over the age of twenty-one years and under the age of seventy years and who are intelligent, of fair character, of approved integrity, well informed, able to read, write, and understand the English language, of sound mind and discretion, and free from all disqualifications herein set forth and from all other legal exceptions, are and shall be competent persons to serve on all grand and petit juries in their respective counties. . . ."

The petitioner contends that exclusion of persons between the ages of eighteen and twenty-one and persons over the age of seventy years resulted in a jury which was not a representative cross-section of the community, thus depriving her of her right to a fair trial guaranteed by the United States Constitution. The Supreme Court of Nebraska rejected this argument, finding that the age groups in question did not comprise an identifiable class and that their exclusion from jury service was not arbitrary. *State v Schwartz*, 199 Neb. 17, 18, 255 N.W.2d 859 (1977).

The Sixth Amendment's guarantee of jury trials in criminal cases was expressly made applicable to the states in *Duncan v Louisiana*, 391 U.S. 145 (1968). The United States Supreme Court held in *Taylor v Louisiana*, 419 U.S. 522 (1975), that a state could not systematically exclude an identifiable class--in that case, women--from serving on juries. Such an exclusion would prevent juries from being selected from "representative cross-sections of the community;" such a selection is "an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528.

There can be no doubt that members of the specified age groups are systematically excluded under Nebraska law from serving on petit juries. Unlike the Louisiana law in *Taylor v Louisiana* which allowed a woman to serve on the jury if she filed "a written declaration of her desire to be subject to jury service." *Taylor*, supra, at n. 1, the Nebraska statute provides that the persons in the specified categories are not qualified to serve on juries. The dispositive question in this case is whether the specified group constitutes an identifiable class. The Supreme Court of Nebraska held it did not; I agree.

Cases from the United States Courts of Appeals support this position. In *United States v Olson*, 473 F.2d 686 (C.A. 8th Cir. 1973), cert. denied, 412 U.S. 905, the Eighth Circuit Court of Appeals was faced with a challenge to a federal statute limiting service on federal juries to those persons over the age of twenty-one. The court held:

> " . . . [T]he dispositive question is whether persons aged eighteen to twenty compose an 'identifiable group' which cannot be systematically excluded from jury service without rendering juries nonrepresentative of community attitudes. But appellant has 'failed to show that the attitudes of this group [18-20] are inadequately represented by those several years older than they, that is, that eighteen to twenty-year olds are a distinct, cognizable group.' United States v Deardorff, 343 F. Supp. 1033, 1043 (S.D. N.Y. 1971). 'The difference in viewpoint between ages [eighteen to twenty and twenty-one to twenty-five, for example,] . . . would not seem to us of any great significance. . . . We regard it as highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older. . . .' King v United States, 346 F.2d 123, 124 (1st Cir. 1965). Accordingly, we hold that persons aged eighteen to twenty are not an identifiable group the exclusion of which renders a jury list nonrepresentative of the community and violative of the Fifth and Sixth Amendments. . . .
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> "In closing, we emphasize that we deal here only with two questions: (1) the effect of the Twenty-Sixth Amendment *per se* on statutes erecting the minimum age for jurors; and (2) the constitutionality under the Sixth Amendment, and the Due Process Clause of the Fifth Amendment, of excluding from federal juries persons aged eighteen to twenty."
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> 473 F.2d at 688-689

See, also, *United States v Geelan*, 509 F.2d 737 (C.A. 8th Cir. 1974), cert. denied, 421 U.S. 999 (1975).

As in *United States v Olson*, supra, the petitioner has failed to show that the attitudes of these groups are inadequately represented by the age group permitted to serve on juries. The only evidence introduced on the subject was introduced at the hearing before this court. The petitioner submitted a document which sets out the total population of Lincoln County, Nebraska, in 1970 and the total number of people comprising the nineteen to thirty-four age category and the over-65 age category. Similar figures are supplied from official 1976 estimates. These statistics, which are of only questionable relevance in computing the percentage of the population consumed by the age groups in question in the instant case, are of no relevance in the determination of whether the interests of these groups are adequately represented by qualified jurors. The holding of *United States v Olson* convinces me that in the absence of some showing that the attitudes of eighteen, nineteen and twenty-year-olds are not adequately represented, it is proper to conclude that exclusion of this age group does not infringe upon any constitutional right of the petitioner.

The petitioner seeks to forestall this holding by shifting the focus of attention from the pool of persons available for jury service to the crime involved:

> "We are not concerned with such crimes as murder, robbery or rape which are not matters viewed differently by those of varying age. Rather, we are dealing with pornography, an emotional issue, one causing a broad spectrum of opinion. To foreclose any part of this spectrum, as the trial court felt compelled to do, is to foreclose a fair trial."
>
> Petitioner's Brief, p. 25

I find no authority for that position. The issue as posed in *Taylor v Louisiana*, supra, is whether the jury is selected from a representative cross-section of the community. The petitioner has failed to convince me that the jury in question was selected in an unconstitutional manner.

II.

CONTEMPORARY COMMUNITY STANDARDS

The trial court gave, inter alia, the following instruction:

> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the contemporary community standard of the intended and probable recipient group is, and in determining the contemporary community standards of said group you may consider the divergent ages, the educated and uneducated, the religious and irreligious men and women, and, of course, the other characteristics which go to make up the 'average person' of the intended and probable recipient group.
>
> "In this connection you may consider the contemporary standards of the community in books, magazines, literature, movies, stage plays, religious, social conduct, and so forth."
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> Transcript, Supreme Court of Nebraska, p. 96

The petitioner urges that "[t]he court never properly instructed the jury on the definition of contemporary community standards." Petitioner's brief, p. 26. However, she concedes in her brief at p. 28 that "the trial court's direction to the jury was not violative of the Federal Constitution." In *Jenkins v Georgia*, 418 U.S. 153, 157 (1974), the United States Supreme Court held:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* [*v California*, 413 U.S. 15 (1973)] approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographical terms, as was done by California in *Miller*."

The petitioner urged on appeal that the Nebraska Supreme Court adopt a more definite standard as a matter of state law, saying:

> " . . . *Jenkins*, however, does not foreclose this Court from considering the trial court's actions in the context of Nebraska constitutional mandates or other principles of basic fairness."
>
> Appellant's Brief, pp. 28-29

Matters of state law are not cognizable in federal habeas corpus unless those matters also affect some federal rights. The petitioner argues that the Supreme Court of Nebraska's

> " . . . refusal to promulgate a single state standard will prevent a uniform application of state criminal law in derogation of Defendant's Fourteenth Amendment right to equal protection under the law. If each trial court can establish its own definition of community, an act deemed criminal in one community or in one judge's court would not be a crime in another court or at another time. A jury's freedom to choose its own standard will result in a denial of equal protection whenever another jury chooses a more lenient test."
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> Petitioner's Brief, p. 31

The argument may relate to the state supreme court's failure to promulgate one specific instruction to be given in obscenity cases. Thus, while the Supreme Court of Nebraska has approved the instruction given in this case, it has not disapproved the giving of an instruction which would establish a community standard based upon a statewide community. If two trial courts in Nebraska apply different tests, a federal constitutional issue might arise. It suffices to note, however, that the petitioner has made no showing that other trial courts in Nebraska have given such differing instructions. I shall not speculate that such is the case.

I conclude that the petition for writ of habeas corpus is without merit.

Dated August 2, 1978.

BY THE COURT

Chief Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 78-1606

Beverly Ann Schwartz, by her next friend, Larry Schwartz,	*	
Appellant,	*	Appeal from the United States District Court for the District of Nebraska.
v.	*	
Gordon Gilster, Lincoln County Sheriff,	*	
Appellee.	*	

Submitted: December 12, 1978

Filed: December 29, 1978

Before GIBSON, Chief Judge, and BRIGHT and HENLEY, Circuit Judges.

PER CURIAM.

This is a habeas corpus proceeding filed on behalf of Beverly Ann Schwartz by Larry Schwartz, her husband and next friend, against Gordon Gilster, Sheriff of Lincoln County, Nebraska. The district court (The Honorable Warren K. Urbom, Chief Judge) found the petition to be without merit and dismissed it. Petitioner has appealed.

Petitioner was charged in the District Court of Lincoln County with selling obscene motion picture films in violation of § 28-926.17, R.R.S. Neb. (Reissue 1975). She pleaded not

guilty and was tried before a jury. The jury found her guilty of the three charges brought against her. She was sentenced to pay a fine of $1,000.00 on each charge and to be confined in the county jail for thirty days on each charge; the sentences were made to run concurrently.

Petitioner appealed to the Supreme Court of Nebraska contending that § 25-1601, R.R.S. Neb. (Reissue 1975), which excludes from jury service persons between the ages of 18 and 21 years and persons 70 years of age or older is unconstitutional, and contending further that the trial court erred in instructing the jury with respect to the "community standards" to be employed by the jurors in determining whether the films in question were obscene. The defendant contended that the "community standards" to be employed were those of the State of Nebraska as a whole which would include the large City of Omaha rather than standards that might prevail in Lincoln County.[1]

The Nebraska Supreme Court considered petitioner's contentions in some detail and rejected them. State of Nebraska v. Schwartz, 199 Neb. 17, 255 N.W.2d 859 (1977). Following the affirmance of her conviction, petitioner was confined in the Lincoln County Jail, and her husband immediately filed the instant habeas corpus petition on her behalf. State

[1]Lincoln County is a large county in the western part of Nebraska. Omaha is a large city in the eastern part of the State which has a racially mixed population which includes members of the armed forces and government employees. Petitioner evidently took the position that community standards based on the State as a whole and including Omaha would probably be more lenient than those prevailing in Lincoln County standing alone.

remedies have been exhausted.

Chief Judge Urbom entertained the writ and ordered petitioner to be released from custody pending disposition of the petition and further ordered that the cash bond that she had deposited in the state court be placed in the registry of the federal district court.

On August 3, 1978 the district court filed a full but unpublished memorandum opinion, and denied the petition.

As to the validity of § 25-1601 dealing with eligibility of persons to serve on juries in Nebraska, the district court distinguished the Nebraska statute from the Louisiana statute that was involved in Taylor v. Louisiana, 419 U.S. 522 (1975); and the district court held that the exclusion from jury service of persons between 18 and 21 years of age and persons 70 years old or older was not unconstitutional, relying on the holdings of this court in United States v. Olson, 473 F.2d 686 (8th Cir.), cert. denied, 412 U.S. 905 (1973). Cf. United States v. Geelan, 509 F.2d 737 (8th Cir. 1974), cert. denied, 421 U.S. 999 (1975).

The district court also concluded that the refusal of the trial court to instruct the jury that in determining the issue of obscenity vel non it should apply the standards of a "statewide community" was not error. See Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

We agree with the Supreme Court of Nebraska and with the district court that petitioner was properly convicted, and we affirm the conviction principally on the basis of Judge Urbom's opinion and the opinion of the Nebraska Supreme Court.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(UNPUBLISHED)